(2)

No. 94-1823

FILED
JUL 10 1995
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM G. PIERCE, PETITIONER

v.

ROBERT B. REICH,
SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

THOMAS S. WILLIAMSON, JR.
Solicitor of Labor
ALLEN H. FELDMAN
Associate Solicitor
STEVEN J. MANDEL
Deputy Associate Solicitor
MARK S. FLYNN
Senior Appellate Attorney
Department of Labor
Washington, D.C. 20210

BEST AVAILABLE COPY

2308

QUESTIONS PRESENTED

1. Whether petitioner's employees were properly held to be non-"professionals" and hence subject to the overtime-compensation requirements of Section 7(a)(1) of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 207(a)(1).

2. Whether regulations of the Department of Labor that employ different tests for determining whether an employee is a "professional" exempted from the FLSA's overtime-compensation requirements, depending on whether the employer is a public or private entity, comport with the equal protection component of the Due Process Clause of the Fifth Amendment.

3. Whether the Portal-to-Portal Act of 1947, 29 U.S.C. 251 *et seq.*, provided a defense to petitioner against liability under the FLSA for not paying overtime compensation.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Abshire v. *County of Kern*, 908 F.2d 483 (9th Cir. 1990), cert. denied, 498 U.S. 1068 (1991)	14
Atlanta Professional Firefighters Union v. *City of Atlanta*, 920 F.2d 800 (11th Cir. 1991)	14
Batterton v. Francis, 432 U.S. 416 (1977)	12
Donovan v. *Carls Drug Co.*, 703 F.2d 650 (2d Cir. 1983)	13
Garcia v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)	11
Kinney v. *District of Columbia*, 994 F.2d 6 (D.C. Cir. 1993)	9, 10
Klein v. *Rush-Presbyterian-St. Luke's Medical Ctr.*, 990 F.2d 279 (7th Cir. 1993)	13
McGowan v. *Maryland*, 366 U.S. 420 (1961)	10
Michigan Ass'n of Governmental Employees v. *Michigan Dep't of Corrections*, 992 F.2d 82 (6th Cir. 1993)	13
Mueller v. *Reich*, Nos. 94-3262 & 94-3263 (7th Cir. May 15, 1995)	13
National League of Cities v. *Usery*, 426 U.S. 833 (1976)	11
Sisson v. *Ruby*, 497 U.S. 358 (1990)	8
Tony & Susan Alamo Found. v. *Secretary of Labor*, 471 U.S. 290 (1985)	10

Constitution, statutes, regulations and rules:

U.S. Const. Amend. V (Due Process Clause)	9

Statutes, regulations and rules—Continued: Page

Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*:
§ 7(a)(1), 29 U.S.C. 207(a)(1) 2
§ 13(a)(1), 29 U.S.C. 213(a)(1) 2, 5, 12, 14, 15
Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.* 7
Portal-to-Portal Act of 1947, 29 U.S.C. 251 *et seq.* 7, 14
§ 4(a)(2), 29 U.S.C. 254(a)(2) 14
§ 10, 29 U.S.C. 259 15
29 C.F.R.:
Section 541.1 2
Section 541.1(f) 3
Section 541.2 2
Section 541.2(e)(1) 3
Section 541.3(a)-(d) 2
Section 541.3(e) 2-3
Section 541.5d 3, 9, 10, 11, 12, 13
Section 541.118(a) 3
Section 541.118(a)(2) 3, 7, 13
Section 541.118(a)(3) 3
Section 541.118(a)(6) 4, 5
6th Cir. R. 14(a) 2
Sup. Ct. R.:
Rule 13.1 2
Rule 13.4 2

Miscellaneous:

56 Fed. Reg. 45,824 (1991) 9
57 Fed. Reg. (1992):
p. 37,666 9
pp. 37,666-37,668 11
p. 37,667 11
pp. 37,667-37,673 12
p. 37,668 9-10
p. 37,669 12
p. 37,670 12
p. 37,672 12

Miscellaneous—Continued: Page

p. 37,677 9
p. 37,678 9

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1823

WILLIAM G. PIERCE, PETITIONER

v.

ROBERT B. REICH,
SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is unpublished, but the decision is noted at 45 F.3d 431 (Table). The opinions of the district court (Pet. App. B1-B3, C1-C9) are unreported.

JURISDICTION

The judgment of the court of appeals was filed on December 20, 1994. A petition for rehearing was

denied on February 7, 1995.[1] The petition for a writ of certiorari was filed on May 5, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7(a)(1) of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 207(a)(1), requires an employer to pay each of its employees "at a rate not less than one and one-half times the regular rate at which he is employed" for all hours worked in excess of 40 hours a week. Section 13(a)(1) of the Act, 29 U.S.C. 213(a)(1), provides an exemption from the requirement of overtime pay for "any employee employed in a bona fide executive, administrative, or professional capacity * * * (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor])."

Regulations promulgated by the Secretary provide that, in order to be a "bona fide * * * professional," an employee must both be paid on a "salary basis," 29 C.F.R. 541.3(e), and have primarily professional duties, 29 C.F.R. 541.3(a)-(d) (defining "professional" employees). See also 29 C.F.R. 541.1 (defining "executive" employees), 541.2 (defining "administrative" employees). Subject to several exclusions, an employee is not paid on a "salary basis," and thus is not a "bona fide * * * professional," if he is paid hourly or piecework wages rather than a salary. 29 C.F.R.

---

[1] Although petitioner filed a document denominated "motion for rehearing en banc," the local rules of the Sixth Circuit provide that a suggestion of rehearing en banc will also be treated as a petition for panel rehearing. See Local R. 14(a). Accordingly, the period for filing a petition for a writ of certiorari in this Court did not begin to run until the court of appeals denied petitioner's motion. See Sup. Ct. R. 13.1, 13.4.

541.3(e) (bona fide professional employee must be "compensated for services on a salary * * * basis" at no less than a specified weekly rate), 541.2(e)(1) (administrative employee), 541.1(f) (executive employee).[2]

An employee is, however, paid on a "salary basis" if he regularly receives a predetermined amount of compensation that "is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. 541.118(a). As a general rule, a "salary basis" employee must also receive "his full salary for any week in which he performs any work without regard to the number of days or hours worked." *Ibid.*[3] An employer may, however, make deductions from a salaried employee's predetermined compensation to reflect absences of "a day or more" for personal reasons other than sickness or accident (29 C.F.R. 541.118(a)(2)) and to reflect absences for "a day or more" due to sickness or disability if "made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability" (29 C.F.R. 541.118(a)(3)). But under no circumstances is an employee from whom pay is deducted to reflect partial-day absences paid on a "salary basis."[4]

The regulations further provide, in a subsection commonly referred to as the "window of correction," that an employer who has improperly deducted pay

---

[2] Professional and administrative employees may also be paid on a fee basis. See 29 C.F.R. 541.2(e)(1), 541.3(e).

[3] An employee need not be paid for any workweek in which he performs no work. 29 C.F.R. 541.118(a).

[4] As explained, p. 10, *infra*, special provisions apply in the case of public employers. 29 C.F.R. 541.5d.

from an employee to reflect partial-day absences may be given an opportunity to repay the deducted amount in order to restore retroactively the employee's professional status. See 29 C.F.R. 541.118(a)(6) (effect of an impermissible deduction for an absence of less than a day "will depend upon the facts in the particular case"). The regulation states in pertinent part (*ibid.*):

> Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

2. Petitioner is the founder, owner and president of Pierce Processing, Inc. (PPI), an engineering consulting firm. Pet. App. A1, C2. PPI employed engineers, design managers and designers and paid them a set amount that, under company policy, was reduced when, for personal reasons, the employees worked less than a day. *Id.* at A2, C3. PPI calculated an hourly rate for each employee by dividing the employee's compensation by 2080 hours (40 hours per week times 52 weeks), and PPI deducted pay for hours not worked based on this calculation. *Ibid.* PPI also paid employees overtime based on this straight hourly rate; it did not pay employees the FLSA-mandated overtime premium of one and one-half times their regular rate of pay. *Id.* at A2.

3. The Secretary of Labor brought this action against petitioner and PPI alleging that PPI had violated the FLSA by failing to pay employees at the overtime rate required by the Act. Pet. App. A2. Petitioner and PPI denied that overtime compensation had been due, on the ground that the employees in question were "professionals" within the meaning of Section 13(a)(1) of the Act. Pet. App. C1-C2. The parties agreed that the employees in question carried out "professional" duties as defined by the Secretary. They disagreed, however, as to whether, as petitioner and PPI claimed, the employees had been paid on a "salary basis" within the meaning of the regulations, or whether, as the Secretary alleged, deductions had been made to reflect partial-day absences. *Id.* at C4, C7.

Following a trial, the district court found that, prior to January 1, 1989 — at which point petitioner and PPI agreed to comply prospectively with the FLSA — "[i]t was [petitioner's and PPI's] practice to take deductions from an employee's salary when the employee was absent for personal reasons for less than a day." Pet. App. C7. The court initially held that it was unnecessary to decide whether, as a result of those deductions, the pertinent employees failed the "salary basis" test, because, in the court's view, petitioner and PPI were entitled to eliminate their liability retroactively by taking advantage of the "window of correction" provided by 29 C.F.R. 541.118(a)(6). That recourse was available, the court held, based on a combination of factors: deductions had not been made when work was lacking, but only when employees voluntarily had been absent for personal reasons; petitioner and PPI had promised to reimburse employees for the deductions PPI had made; PPI was

presently in compliance with the FLSA; and petitioner and PPI had promised to remain in compliance. Pet. App. C7-C8. The court accordingly ruled that, provided that petitioner and PPI repaid the improper deductions, it would enter an order to the effect that petitioner and PPI were exempt from the Act under the "window of correction." *Id.* at C8. That decision was issued on March 25, 1992. Five months later, the district court was notified that petitioner and PPI had not complied with its order requiring them to compensate employees for the improper deductions. The district court thereupon, in September 1992, issued an order requiring petitioner to show cause why the court's earlier order should not be rescinded and judgment entered in favor of the Secretary. *Id.* at A3, B2. On November 30, 1992, the district court ordered PPI and petitioner to reimburse the employees within 30 days. On February 9, 1993, with petitioner and PPI having still failed to repay the deducted income, the court entered judgment in favor of the Secretary. It held that "[d]efendants' employees were not exempt from the overtime provisions of the Act[,] [s]ee 29 U.S.C. §207(a)(1), 29 C.F.R. §541.3(e), 541.118(a), (a)(2) and (a)(6)," and ordered petitioner and PPI to pay $10,842 in back overtime wages plus interest. *Id.* at B2-B3.

4. The court of appeals affirmed. Pet. App. A1-A8.[5] It held that because petitioner's employees were

---

[5] Both petitioner and PPI appealed, but the court of appeals dismissed PPI's appeal because PPI was not represented by counsel. See Pet. App. A3 n.1. The Secretary also filed a cross-appeal challenging the district court's refusal to grant a permanent injunction prohibiting petitioner and PPI from engaging in future violations of the FLSA. The court of appeals

docked pay for missing a fraction of a day, they could not be considered salaried employees, but rather were hourly workers entitled to overtime pay at the one-and-one-half-time premium mandated by the FLSA. *Id.* at A5-A6. In so ruling, the court first rejected petitioner's argument that the Secretary's regulation defining "salary basis" was inconsistent with what petitioner claimed was Congress's intent, as revealed in "subsequent legislation," to require compensation of employees "only when they perform work and flexible unpaid leave." *Id.* at A5. The court held that the enactments identified by petitioner do "not dismiss [*sic*] the regulatory exemption for salaried workers and [petitioner's] argument must fail." *Ibid.*[6] It also rejected petitioner's claim that the term "day" as used in 29 C.F.R. 541.118(a)(2) in fact includes partial days and that he was therefore entitled to deduct employees' wages for partial-day absences, because such absences were not "less than a * * * day." Pet. App. A5. The court held that the term "day" refers to "the standard, eight-hour day." *Ibid.*

The court of appeals also rejected petitioner's claim that the district court improperly denied him the opportunity to take advantage of the "window of correction." It held that the district court had acted properly and consistent with the Secretary's regula-

---

held that the district court did not abuse its discretion in refusing to enter such an injunction. *Id.* at A7-A8.

[6] We assume that in the quoted passage the court meant "discuss," rather than "dismiss." The legislation upon which petitioner relied was the Portal-to-Portal Act of 1947, 29 U.S.C. 251 *et seq.*, and the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601 *et seq.* See Pet. App. A5 n.2. Petitioner does not rely on the FMLA in his petition.

tion when it conditioned its finding of exempt status on petitioner's reimbursement of the deductions he had improperly taken, and on petitioner's promise to comply with the FLSA in the future. Pet. App. A6-A7. The court also rejected petitioner's claim that his alleged "financial inability excuse[d] his failure to reimburse the past deductions," noting that the regulation establishing a "window of correction" does not provide for an extension of exempt status due to inability to pay and that, in any event, petitioner "provided no evidence [regarding] his ability to repay the deductions." *Ibid.* The court of appeals thus held that the district court correctly "removed the window of correction" and ordered PPI and petitioner to pay the overtime compensation due. *Id.* at A7.

ARGUMENT

The decision below is correct, and it conflicts with no decision of this Court or of any court of appeals. Moreover, the judgment that has been entered in this case against PPI, petitioner's wholly owned corporation, is now res judicata. See n.5, *supra*. Review is therefore not warranted.

1. Petitioner argues (Pet. 8-17) that he was denied the equal protection of the laws because the Secretary's regulations presently define "salary basis" more restrictively in the context of private employers than in that of public employers. That claim was neither raised nor ruled upon below, and has therefore been waived. See *Sisson* v. *Ruby*, 497 U.S. 358, 359 n.1 (1990).[7] Moreover, petitioner's conduct

---

[7] In a paragraph in the second of his two briefs to the court of appeals, petitioner argued that the more lenient definition of "salary basis" used in the public-employee context made

occurred prior to the Secretary's adoption of a different "salary basis" test governing public employers. As we explain below, the Secretary has promulgated a regulation, 29 C.F.R. 541.5d, that generally permits public employers to make deductions based on partial-day absences from the salaries of professional employees, without losing their exempt status. That regulation, however, was not adopted until August 1992, see 57 Fed. Reg. 37,666, 37,677 (1992), more than three years after the violations at issue in this case, and it does not apply retroactively. See *id.* at 37,678; *Kinney* v. *District of Columbia*, 994 F.2d 6, 10 (D.C. Cir. 1993). Petitioner thus has no standing to challenge in this lawsuit the distinction presently drawn by the Secretary between employees of public and private employers.[8]

"common sense," and argued that the same standard should apply to employees of private employers. See C.A. Br. 9-10. Petitioner, however, nowhere asserted that the differing standards utilized by the Secretary constituted a violation of the equal protection component of the Due Process Clause of the Fifth Amendment.

[8] A precursor of 29 C.F.R. 541.5d was adopted on an interim basis in September 1991, but adoption of that interim regulation also postdated the violations in this case. See 56 Fed. Reg. 45,824 (1991). Before that interim regulation was adopted, the Secretary had in 1987 announced that the Department of Labor would not enforce the "no partial-day deduction" rule against state and local governments in discrete circumstances. The Secretary's policy, however, did not alter the substantive standards of the "salary basis" test for public employers as set forth in the regulations, and the Department specifically advised public employers that "[t]his nonenforcement policy is not intended to affect any employee's rights under section 16(b) of [the] FLSA." See Letter Ruling, Department of Labor, Wage & Hour Division (Jan. 9, 1987), *reprinted at* 57 Fed. Reg. 37,668

In any event, the Secretary's differing definitions of "salary basis," depending on whether the employer is a public or private concern, comport with equal protection principles. A classification that treats some groups differently from others, but is not based on suspect classifications and does not affect fundamental rights, is valid if it has a rational basis. *McGowan* v. *Maryland*, 366 U.S. 420, 425 (1961); see also *Tony & Susan Alamo Found.* v. *Secretary of Labor*, 471 U.S. 290, 306 n.32 (1985). The Secretary's regulation, 29 C.F.R. 541.5d, which amended the generally applicable "salary basis" test to provide greater latitude for public employers in making deductions from the pay of otherwise FLSA-exempted employees, has a rational basis.

The regulation provides, in pertinent part, that a public employee who otherwise qualifies as an executive, professional, or administrative employee will not lose that status if the employee

> is paid according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one workday.

(1992); see also *Kinney*, 994 F.2d at 9 (despite nonenforcement policy, holding public employer liable based on its violations of pre-1992 regulatory scheme).

29 C.F.R. 541.5d. As the Secretary has explained, the Department of Labor modified the "no partial-day deductions" rule in the public-employee context based on its evaluation of the unique nature of public employment. That evaluation was occasioned by this Court's decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), which held that the FLSA could constitutionally be applied to state and local government employees performing traditional governmental functions.[9] The Secretary noted that the general "salary basis" regulations—first promulgated in 1940—had been based on evidence that professional, executive, and administrative employees in the private sector were nearly always paid on a salary basis. 57 Fed. Reg. 37,666-37,668 (1992). By contrast, the Secretary noted, public employers are normally subject to "principles of public accountability" that prohibit paying employees for time not worked. See *id.* at 37,667.

Applying to public employers the traditional "salary basis" rule regarding the deduction of pay for partial-day absences, the Secretary recognized, would prevent state and local governments from availing themselves of the exemption to the requirement of overtime pay for professional, administrative, and executive employees. 57 Fed. Reg. 37,667 (1992). That result, however, would be inconsistent with Congress's intent in extending the FLSA to state and public employers,

---

[9] The FLSA had been amended in 1966 and 1974 to cover governmental employers. However, it was not until the 1985 decision in *Garcia*, in which this Court overruled *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), that the FLSA's provisions could constitutionally extend to state and local public employees engaged in traditional governmental functions.

because it was clear that Congress had intended that such employees be exempt in the public-sector context. *Id.* at 37,672. Indeed, the Secretary noted that, since the decision in *Garcia*, public employers had been exposed to "potentially enormous and generally unexpected back wage liabilities" for wages owed to employees who would have been considered exempt "professionals" were it not for their employers' adherence to a "public accountability" pay system that required partial-day deductions. *Id.* at 37,669, 37,670. Thus, the Secretary concluded, "the regulatory requirements adopted before Congress extended FLSA coverage to State and local governments simply could not operate in a manner that effectively distinguished exempt from non-exempt public employees." *Id.* at 37,672.[10]

The distinction presently drawn between the "salary basis" test applicable to private employers and that applicable to public employers therefore plainly has a rational basis. In the judgment of the Secretary, the "public accountability" pay systems under which public employees are paid make the "no partial-day deductions" rule an ill-suited and unrealistic measure of whether particular employees are exempt professionals. By contrast, the Secretary reasoned, the traditional "salary basis" test remains a useful

---

[10] In light of the Secretary's detailed explanation of his reasons for adopting Section 541.5d, petitioner's suggestion (Pet. 11-12) that the Secretary has not supplied an adequate explanation for his change of policy is without merit. See 57 Fed. Reg. 37,667-37,673 (1992). Moreover, the regulation is clearly a valid exercise of the broad rulemaking authority granted to the Secretary to define and delimit the Section 13(a)(1) exemptions. Compare *Batterton* v. *Francis*, 432 U.S. 416, 424-426 (1977).

criterion in the private sector. See *Mueller* v. *Reich*, Nos. 94-3262 & 94-3263 (7th Cir. May 15, 1995), slip op. 6-7 (to be reported at 54 F.3d 438) (holding, based on the need for public employees to be subject to principles of "public accountability," that 29 C.F.R. 541.5d is rationally related to the objectives of the FLSA).

2. Petitioner next argues (Pet. 17) that the Secretary has misinterpreted his own regulations in determining that a private-sector employee who has been subject to deductions reflecting partial-day absences is not an exempted "professional." Petitioner contends that those regulations should be interpreted to bar employers only from making deductions for hours not worked due to the unavailability of work, and that employees should not lose their exempt status where pay has been deducted for hours that the employee has not worked due to personal unavailability. Petitioner's claim is defeated by 29 C.F.R. 541.118(a)(2), which makes an exception from the general rule that salaried employees are paid "without regard to the number of days or hours worked," but only "if an employee is absent for *a day or longer* to handle personal affairs." *Ibid.* (emphasis added). No such exception applies for deductions reflecting partial-day absences. See *Michigan Ass'n of Governmental Employees* v. *Michigan Dep't of Corrections*, 992 F.2d 82, 84 (6th Cir. 1993); *Klein* v. *Rush-Presbyterian-St. Luke's Medical Ctr.*, 990 F.2d 279, 283 (7th Cir. 1993); *Donovan* v. *Carls Drug Co.*, 703 F.2d 650, 652 (2d Cir. 1983).

Also unavailing is petitioner's claim (Pet. 17-24) that there is "confusion" about what constitutes a day within the meaning of the regulation. The Secretary has interpreted that term, consistent with its ordinary usage, to mean the employee's customary work day,

see Gov't C.A. Br. 24-26, and the court of appeals likewise recognized that term to connote "the standard eight-hour day," Pet. App. A5. The decisions on which petitioner relies (Pet. 18 nn.10, 12) do not discuss the proper interpretation of the term "day." There is some tension in those decisions on a separate question: whether an employer loses the Section 13(a)(1) exemption when employees are merely "subject to" a policy of partial-day deduction, or whether the employer must have made an actual deduction from employees' compensation to reflect a partial-day absence. Compare *Atlanta Professional Firefighters Union* v. *City of Atlanta*, 920 F.2d 800, 805 (11th Cir. 1991) (actual deductions required in order for employer to lose exemption) with *Abshire* v. *County of Kern*, 908 F.2d 483 (9th Cir. 1990) (exemption lost where employees are "subject to" policy under which such deductions would be mandated), cert. denied, 498 U.S. 1068 (1991). That issue is not presented in this case, however, because it is clear that petitioner and PPI actually deducted compensation from employees based on partial-day absences. See Pet. App. C7. Moreover, petitioner has not argued that relief in this case should have been awarded only to those employees who experienced actual deductions and only to the extent of those deductions.

3. Petitioner next argues (Pet. 28-30) that the decision below is inconsistent in two respects with the Portal-to-Portal Act of 1947, 29 U.S.C. 251 *et seq.* Petitioner claims first (Pet. 30-31) that his practice of making deductions for partial-day absences was justified under Section 4(a)(2) of the Act, 29 U.S.C. 254(a)(2), which relieves employers of the duty to pay minimum wage and overtime compensation for

activities either preliminary or subsequent to the principal activities that the employee is employed to perform. The Portal-to-Portal Act, however, merely defines certain activities for which the employer is not required to provide compensation at all; it does not address the question whether an employee is "salaried" or otherwise falls within the Section 13(a)(1) exemption for professional, executive, or administrative employees. Moreover, the Secretary's "salary basis" regulation does not require that employees be compensated for absences of less than a day. It merely provides that if deductions are made to reflect such absences, the affected employees may not be considered exempted professional, administrative, or executive employees.

Petitioner also claims (Pet. 31) that he is entitled to a defense under Section 10 of the Portal-to-Portal Act, 29 U.S.C. 259, because, he alleges, he undertook his pay practices believing them to be lawful. Petitioner has waived that claim by failing to raise it below. In any event, Section 10 of the Portal-to-Portal Act does not apply to this case. Section 10 absolves an employer for liability for acts or omissions that he demonstrates were in "good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation" by the Administrator of the Wage and Hour Division of the Department of Labor. However, as we have explained, the Department's regulations supply no basis for a defense of reasonable good-faith reliance here, but instead make clear that an employer who makes deductions from employees' wages to reflect partial-day absences cannot claim that those employees are professionals paid on a "salary basis." Petitioner does not identify any written opinion of the Department

upon which he claims to have relied in making such deductions while withholding the overtime compensation required by the FLSA.

4. Finally, petitioner's unfocused discussion (Pet. 25-26) of the Secretary's "window of correction" regulation presents no issue warranting review. The district court gave petitioner the opportunity to take advantage of the window of correction and to avoid liability for overtime compensation by reimbursing his employees for the partial-day deductions he had made and by promising to comply with the FLSA in the future. The district court imposed liability only after petitioner failed to reimburse his employees for the deductions, as petitioner concedes. See Pet. 6 n.2. The court of appeals affirmed on the ground that petitioner's failure to repay the wages he had deducted supplied a valid basis for closing the window of correction and for imposing liability for the unpaid overtime wages. That is the only ruling below relating to the window of correction that adversely affected petitioner, and he does not seek review of it.[11] Thus, no question pertaining to the window of correction is suitable for review by this Court.

---

[11] In the court of appeals, the Secretary argued that the district court's ruling could be upheld on the alternative ground that, because petitioner had not made deductions inadvertently and because petitioner did not otherwise pay the employees in question on a salary basis, he was not entitled to take advantage of the window of correction. Gov't C.A. Br. 29. The court of appeals did not reach that issue, however, because it held that the district court had properly "removed" the window of correction when petitioner failed to correct his pay practice by reimbursing his employees for past deductions. Pet. App. A7.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

THOMAS S. WILLIAMSON, JR.
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

STEVEN J. MANDEL
Deputy Associate Solicitor

MARK S. FLYNN
Senior Appellate Attorney
Department of Labor

JULY 1995